

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

-----  
Lehman Brothers Holdings, )  
Inc., ) File No. 20-cv-1351  
) (SRN/HB)  
)  
Plaintiff, )  
) Saint Paul, Minnesota  
vs. ) December 16, 2020  
) 9:30 a.m.  
LendingTree, LLC, )  
and LendingTree, Inc., ) HEARING HELD VIA ZOOM  
) FOR GOVERNMENT  
Defendants. )  
-----

BEFORE THE HONORABLE SUSAN RICHARD NELSON  
UNITED STATES DISTRICT COURT JUDGE  
**(MOTIONS HEARING)**

APPEARANCES

For the Plaintiff: WOLLMUTH MAHER & DEUTSCH LLP  
JOSHUA SLOCUM, ESQ.  
ADAM M. BIALEK, ESQ.  
BRAD J. AXELROD, ESQ.  
500 Fifth Avenue  
New York, New York 10110  
  
GREENE ESPEL PLLP  
MATTHEW D. FORSGREN, ESQ.  
222 South 6th Street  
Suite 2200  
Minneapolis, Minnesota 55402  
  
For the Defendants: JONES DAY  
MATTHEW CORCORAN, ESQ.  
325 John J. McConnell Boulevard  
Suite 600  
Columbus, Ohio 43215-2673  
  
JONES DAY  
CARL E. BLACK, ESQ.  
901 Lakeside Avenue  
North Point  
Cleveland, Ohio 44114-1190

1 For the Defendants: JONES DAY  
2 KELLY G. LAUDON, ESQ.  
3 90 South Seventh Street  
Suite 4950  
Minneapolis, Minnesota 55402

4 Court Reporter: CARLA R. BEBAULT, RMR, CRR, FCRR  
5 316 North Robert Street  
6 Suite 146 U.S. Courthouse  
Saint Paul, Minnesota 55101

7  
8 Proceedings recorded by mechanical stenography;  
9 transcript produced by computer.  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 P R O C E E D I N G S

2 VIA ZOOM FOR GOVERNMENT

3  
4 MR. SLOCUM: Good morning, Your Honor.

5 MR. CORCORAN: Good morning, Your Honor.

6 THE COURT: Very good. Good morning. We are here  
7 today in the matter of Lehman Brothers Holdings, Inc.,  
8 versus LendingTree, LLC, et al. This is civil file number  
9 20-1351. Let's begin with appearances for the plaintiff,  
10 please.

11 MR. FORSGREN: Good morning, Your Honor. Matt  
12 Forsgren for Lehman Brothers.

13 THE COURT: Good morning.

14 MR. SLOCUM: Good morning, Your Honor. Joshua  
15 Slocum of Wollmuth Maher & Deutsch for Lehman Brothers.  
16 Here with me is my colleague Adam Bialek, and also Brad  
17 Axelrod is joining us as well. I will be arguing.

18 THE COURT: Very good. All right. And for the  
19 defense, please.

20 MS. LAUDON: Good morning, Your Honor. Kelly  
21 Laudon with Jones Day here on behalf of the defendants.  
22 Also with me today is Mr. Corcoran, Matthew Corcoran, and  
23 Carl Black, and Mr. Corcoran will be arguing.

24 THE COURT: Very good. We are here to consider  
25 the defendants' motion to dismiss or, in the alternative, to

1 transfer venue or to compel arbitration. Mr. Corcoran.

2 MR. CORCORAN: Thank you, Your Honor. May it  
3 please the Court, Matthew Corcoran with Jones Day on behalf  
4 of the defendants LendingTree, Inc., and LendingTree, LLC.

5 This case has no material relationship to  
6 Minnesota. None of the parties is organized under the laws  
7 of Minnesota. None of the parties maintains offices in  
8 Minnesota, much less a principal place of business.

9 The plaintiff Lehman is a Delaware corporation  
10 with a principal place of business in New York. Lehman's  
11 employees work in Colorado, Kansas and New York. None work  
12 in Minnesota.

13 Both of the defendants were organized under the  
14 laws of the Delaware and have a principal place of business  
15 in Charlotte, North Carolina. The majority of defendants'  
16 employees work in Charlotte and none of them work in  
17 Minnesota.

18 Similarly, Lehman's claims are not based on any  
19 activity that occurred in Minnesota. Lehman seeks to  
20 enforce against both defendants a \$13.3 million claim that  
21 was allowed by the Bankruptcy Court in the Northern District  
22 of California pursuant to a settlement between Lehman and a  
23 California Chapter 7 trustee in Home Loan Center's  
24 California bankruptcy. That allowed claim relates to loans  
25 an affiliate of Lehman bought from HLC.

1           During that time that HLC was selling those loans  
2           it was headquartered in Irvine, California and Lehman's  
3           banking affiliate was headquartered on the east coast. The  
4           contracts to which HLC sold those loans are governed by New  
5           York law and have no forum selection clause, and Lehman's  
6           contractual claims against HLC are based on representations  
7           and warranties that HLC made from California to Lehman's  
8           banking affiliate on the east coast.

9           Moreover, the alleged conduct of defendants that  
10          Lehman contends make them liable for the HLC allowed claim  
11          did not occur in Minnesota. Count One relies on the  
12          separation agreement and LendingTree, Inc.'s SEC filings.  
13          The separation agreement is a contract among Delaware  
14          entities that chooses Delaware law and requires disputes to  
15          be arbitrated in Delaware. LendingTree, Inc. made its SEC  
16          filings from its offices in North Carolina.

17          Counts Two and Three are based upon defendants'  
18          alleged domination and control from Charlotte, North  
19          Carolina over HLC's activities in Irvine, California until  
20          2012; and thereafter HLC's activities in Charlotte, North  
21          Carolina. There are no material facts that tie this dispute  
22          to this forum. Indeed, Lehman alleged only two facts tying  
23          the parties and the claims asserted in the complaint to  
24          Minnesota.

25          One, LendingTree, LLC registered an agent for

1 service of process in Minnesota; and two, HLC originated in  
2 Minnesota some unidentified portion of the loans it sold to  
3 a Lehman's affiliate. Neither of those facts are  
4 sufficient, independently or collectively, to provide this  
5 Court with jurisdiction over all the parties or to make  
6 Minnesota a proper or convenient forum.

7 Start with the latter, the alleged origination of  
8 loans in Minnesota. The underlying dispute between HLC and  
9 Lehman's affiliate is not about loan originations made in  
10 California to residents of the 50 states. It is about the  
11 representations and warranties that HLC made to Lehman from  
12 its offices in California to Lehman's banking affiliate on  
13 the east coast. Using the state of origination here would  
14 be like using the place where a car was manufactured to  
15 create jurisdiction and venue in a dispute between a car  
16 dealership and a car buyer over a sales contract.

17 The place of origination is simply not material to  
18 the dispute. And even if it were, Your Honor, Lehman does  
19 not allege that the number of loans originated in Minnesota  
20 represent a meaningful portion of the loans underlying  
21 Lehman's allowed claim in the California Bankruptcy Court.  
22 Thus, imputing HLC's contacts to the defendants would not  
23 give this Court personal jurisdiction over all the  
24 defendants or make Minnesota a proper or convenient forum.

25 Next, take LendingTree, LLC's registered agent.

1 While it is the defendants' position recent Supreme Court  
2 precedent has abrogated the Eighth Circuit decision in  
3 *Knowlton*, we acknowledge that Your Honor ruled in *Dairy*  
4 *Queen* that you must follow *Knowlton* unless and until the  
5 Eighth Circuit overrules it. Thus, we simply are preserving  
6 that issue with respect to LendingTree, LLC for appeal.

7 However, it does not provide personal jurisdiction  
8 over LendingTree, Inc. Lehman tries to impute LendingTree,  
9 LLC's registered agent to LendingTree, Inc. under a veil-  
10 piercing theory. But veil piercing allows the Court to  
11 pierce the corporate veil, not eliminate it. LendingTree,  
12 LLC's registering of an agent in Minnesota has nothing to do  
13 with HLC's dispute with Lehman. Thus, even if the Court  
14 could impute HLC's relationship with Lehman's affiliates  
15 first to LendingTree, LCC, and then to LendingTree, Inc., it  
16 could not also impute LendingTree, LLC's registered agent to  
17 LendingTree, Inc. Consequently, the Court lacks personal  
18 jurisdiction over all defendants and this is not a proper  
19 forum.

20 The forum is also inconvenient. The parties are  
21 not in Minnesota, no witnesses are in Minnesota, and  
22 Minnesota law has no bearing on the outcome of this case.  
23 North Carolina is a much more convenient forum given that  
24 the defendants are located there and much of the alleged  
25 conduct occurred there.

1 I want to address two points that Lehman raises in  
2 its opposition. First, the ResCap case that the Court  
3 recently dismissed should not alter that analysis. Choice  
4 of forum is about the location of parties, witnesses, and  
5 where the underlying dispute occurred. It is not about  
6 legal theories. The fact that Lehman asserts the same legal  
7 theories as a previous case before this Court does not allow  
8 them to pick an inconvenient forum. The case was dismissed  
9 as a result of a settlement before the Court heard any  
10 evidence in the case. This Court simply made a legal ruling  
11 on a motion to dismiss which all courts around the country  
12 are well equipped to do. The *ResCap* case simply had not  
13 progressed far enough to provide this Court with a material  
14 advantage over other courts in resolving this dispute.

15 Second, Your Honor, neither of Lehman's choices of  
16 forum should be given any weight. First, courts in this  
17 district give the plaintiff's choice of forum far less  
18 deference when the plaintiff does not reside here or the  
19 underlying facts did not occur here. Both of those  
20 circumstances are present here. Thus, Lehman's first choice  
21 of forum should receive no deference.

22 Lehman's second choice of forum should receive no  
23 deference either. Here Judge Ericksen's decision in *RFC v.*  
24 *Cherry Creek* is instructive. There ResCap asked to transfer  
25 one of its representation and warranty cases back to New



1 York after filing that case in Minnesota based upon a forum  
2 selection provision in the underlying contract choosing  
3 Minnesota.

4 The Court explained that the plaintiff's choice of  
5 New York was entitled to "no weight" because the plaintiff's  
6 venue privilege can only be exercised once. As the Court  
7 stated there, "only that initial choice deserves deference."  
8 So too here, plaintiffs should not get a second bite at the  
9 apple now that it has admitted that Minnesota is an  
10 inconvenient forum by informally requesting transfer to New  
11 York.

12 For those reasons and the reasons set forth in our  
13 papers, we ask the Court to dismiss LendingTree, Inc. and to  
14 transfer the case to the Western District of North Carolina.

15 If the Court decides to keep the case, we ask the  
16 Court to compel arbitration of Count One and stay the  
17 remaining counts. Lehman has sued on a contract in Count  
18 One that contains a binding arbitration provision. Under  
19 controlling Delaware law, Lehman is bound by that provision  
20 and must arbitrate that claim.

21 Moreover, the separation agreement vests in the  
22 arbitrator the ability to decide whether a claim is  
23 arbitrable in the first instance. Thus, Lehman has to  
24 arbitrate its claims.

25 Unless the Court has any questions, that completes

1 my opening presentation and I will reserve anything else for  
2 reply.

3 THE COURT: Thank you, Mr. Corcoran.

4 MR. CORCORAN: Thank you, Your Honor.

5 THE COURT: Who wishes to be heard for Lehman  
6 Brothers?

7 MR. SLOCUM: Good morning, Your Honor. May it  
8 please the Court, Joshua Slocum, again of Wollmuth Maher &  
9 Deutsch on behalf of Lehman Brothers. And this forum is  
10 rather new to me. We can't be together in Your Honor's  
11 courtroom the way we might like, times being what they are,  
12 but in this virtual setting we're still guests in your home  
13 and we'll comport ourselves as such.

14 THE COURT: You are literally guests in my home,  
15 actually.

16 MR. SLOCUM: Pardon me, Your Honor?

17 THE COURT: You are literally guests in my home  
18 because we can't be in our courtroom, so you're all in my  
19 home.

20 MR. SLOCUM: The main premise of LendingTree's  
21 motion is that this case has no connection to Minnesota or  
22 to this Court. Because that premise is incorrect, the  
23 motion should be denied.

24 Now, it's true that this is a multi-state  
25 controversy. Multi-state controversies are not unusual,

1 especially in the federal courts. The case will touch on  
2 many different states and the laws of many different states.

3 But as I will elaborate, the case has a  
4 substantial connection to Minnesota. It involves two  
5 defendants who were both subject to the Court's general  
6 jurisdiction. The law requires no more in order for this  
7 Court to exercise jurisdiction over the case, and it makes  
8 eminent sense for the Court to do so.

9 Now, as Your Honor knows, Home Loan Center, or  
10 HLC, was before this Court for many years in an  
11 indemnification action brought by ResCap for losses on  
12 mortgage loans that ResCap had bought from HLC. That  
13 culminated in a lengthy trial before Your Honor in 2018.

14 During the same period, Lehman was in a similar  
15 boat. It had filed very similar claims against HLC in the  
16 New York Bankruptcy Court. Now, those claims were a few  
17 years behind *ResCap* procedurally because of the time when  
18 Lehman settled its underlying mortgage loan liabilities.  
19 But included in Lehman's case against HLC were four loans  
20 from Minnesota with aggregate losses in excess of \$400,000.  
21 We submit that those loans are sufficient to create a  
22 substantial connection to Minnesota.

23 And although it is true that HLC's breaches were  
24 by no means limited to the Minnesota loans, I mean they were  
25 breaches from states all around the country, as I mentioned,

1 this is very much a multi-state controversy, but a  
2 multi-state controversy has to be seated somewhere.

3 And when this Court entered judgment in favor of  
4 ResCap, LendingTree put HLC into bankruptcy staying Lehman's  
5 case. In that bankruptcy it was first revealed that HLC had  
6 been woefully undercapitalized. It had on the order of \$5  
7 million of cash and it basically upstreamed the rest of it  
8 to LendingTree.

9 So ResCap filed suit here to enforce its HLC  
10 judgment against LendingTree. Now, HLC was wholly owned by  
11 LendingTree Sub at that time -- defendants call it Tree, LLC  
12 in their briefs -- and LendingTree Sub is, in turn, wholly  
13 owned and controlled, as I will explain, by LendingTree  
14 Parent or Tree-Inc., as defendants call it. Either is fine  
15 with me.

16 The LendingTree defendants filed a very  
17 substantive motion to dismiss ResCap's complaint. It  
18 required this Court to take a deep dive into the contracts  
19 at issue and the legal doctrines governing the relationship  
20 between LendingTree and HLC. That all happened while Lehman  
21 was finalizing its allowed claim into bankruptcy against  
22 HLC.

23 The Court considered in that motion many of the  
24 same arguments that bring us here today. The Court denied  
25 HLC -- or pardon me -- LendingTree's motion to dismiss in a

1       lengthy and thoroughly-reasoned opinion. So after obtaining  
2       its allowed claim against HLC, Lehman filed its case here as  
3       well.

4               This case is in every material respect a carbon  
5       copy of ResCap's case. We pled the exact same three claims  
6       in the exact same way they did. They mentioned that we  
7       copied and pasted from their complaint. We did. There was  
8       no reason to use different verbiage or to plead things in  
9       any different way because they are literally the same claims  
10      that Your Honor has already considered.

11             Now, the factual and legal issues are the same.  
12      Your Honor is not only familiar with them from that *ResCap*  
13      case but has decided a number of them. The defendants are  
14      obviously the same as they were in the *ResCap* case. This is  
15      just a different plaintiff alleging the same things. And  
16      just as it did in the *ResCap* case, LendingTree now moves  
17      before Your Honor to dismiss or to compel arbitration,  
18      making many of the exact same arguments that they made in  
19      *ResCap*. The only real new piece to this motion is that in  
20      the alternative LendingTree seeks a transfer to its home  
21      forum in the Western District of North Carolina with which  
22      Lehman has no contacts at all.

23             So overwhelmingly, as I mentioned, this motion  
24      that brings us here today raises issues that Your Honor has  
25      already considered very carefully and decided in the nearly

1 identical case that ResCap brought against LendingTree. And  
2 since those two actions are essentially identical, I  
3 respectfully propose in my presentation now not to dwell too  
4 much on the issues that Your Honor has already decided quite  
5 correctly in the *ResCap* case. I'll tick through them very  
6 quickly and then move on to the new issues. I'll, of  
7 course, be happy to address them or to answer any questions  
8 if Your Honor has any.

9 There are three main issues that have already been  
10 decided. First, Your Honor has already ruled that  
11 LendingTree Sub is subject to general personal jurisdiction  
12 in this court because it is a registered agent in the state  
13 and therefore, under Eighth Circuit precedent, has consented  
14 to jurisdiction. That means that LendingTree Sub is subject  
15 to jurisdiction for any and all claims.

16 Second, Your Honor has already ruled that  
17 LendingTree Parent cannot compel arbitration of Count One  
18 and get out of this case based on the arbitration clause in  
19 the Spin agreement pursuant to which it agreed to assume all  
20 of the liabilities of HLC. Your Honor correctly decided  
21 that ResCap was not bound to arbitrate. Lehman is situated  
22 in the exact same way. There's no difference.

23 And I would just want to pause just for a moment  
24 on this arbitration issue before I move on. When  
25 Mr. Corcoran was here at the beginning of this year at oral

1 argument on the motion to dismiss the *ResCap* case, he  
2 conceded to Your Honor's question that, "I don't think the  
3 arbitration clause would bind a party suing under a  
4 successor theory."

5 Now, of course, Mr. Corcoran disputed in that case  
6 that *ResCap* had pled a successor theory, but Your Honor  
7 interpreted *ResCap*'s claim as a successor claim, quite  
8 rightly we would submit, and so we pled our own successor  
9 claim in the exact same way. Again, there was no reason for  
10 us to plead the claim any differently when Your Honor had  
11 already considered and carefully addressed the claims that  
12 *ResCap* pled.

13 So third and finally, moving to the last issue  
14 that Your Honor has already ruled, and defendants in fact  
15 clarified in their reply brief that they don't dispute for  
16 the purposes of this motion that HLC's jurisdictional  
17 contacts with Minnesota will be imputed to them due to their  
18 domination and control of HLC. So that means that if HLC  
19 would be subject to jurisdiction here, so would the  
20 *LendingTree* defendants on the issue of specific  
21 jurisdiction.

22 So I think what remains of this motion are three  
23 main issues that I'll address. One, does this Court have  
24 general personal jurisdiction over *LendingTree* Parent. It  
25 has jurisdiction over the Sub. If it has jurisdiction over

1 the Parent, then that settles the jurisdictional question.

2 Two, do HLC's contacts with Minnesota in relation  
3 to this lawsuit give rise to specific personal jurisdiction  
4 in this case; and if so, that would be imputed to the two  
5 defendants here and they would both be subject to the  
6 Court's jurisdiction. As to these issues one and two, Your  
7 Honor only need to cite one of them. Either one is  
8 sufficient to give rise to jurisdiction.

9 And three, should this case be transferred and, if  
10 so, where. I'll take these in order. I'll start with issue  
11 number one which is general jurisdiction of LendingTree  
12 Parent. The Court has general jurisdiction over LendingTree  
13 Parent because it dominates and controls its subsidiary we  
14 call LendingTree Sub, which has consented to jurisdiction.  
15 The two entities are considered one and the same for  
16 jurisdictional purposes.

17 Now, as I mentioned, this Court already held,  
18 defendants don't dispute, that the jurisdictional contacts  
19 of HLC, which is a subsidiary of LendingTree Sub, or was,  
20 and a step removed from LendingTree Parent, can be imputed  
21 to LendingTree Parent. It stands to reason that the context  
22 of LendingTree Sub, which sits between those two entities,  
23 can be imputed up the chain as well. And that conclusion is  
24 confirmed by a number of undisputed facts which we laid out  
25 in our brief. There's been no counterevidence whatsoever.



1 These facts are in fact drawn from their own SEC filings, so  
2 there's no dispute whatsoever. I'll highlight some of them.

3 LendingTree Parent wholly owns LendingTree Sub.  
4 There's no dilution of ownership whatsoever. They share the  
5 exact same offices. In fact they have the exact same people  
6 running both companies. They have the same CEO, the same  
7 president, and the same CFO. And we've submitted their  
8 employment agreements together with our motion in which it's  
9 demonstrated that while they are nominally employed by  
10 LendingTree Sub, they are compensated with equity in  
11 LendingTree Parent; and their employment agreements  
12 expressly task these top executives with acting on behalf of  
13 what they call "the company group."

14 So there's really no daylight between these two  
15 entities. They share the same website. They consolidate  
16 their financials. And LendingTree Parent, which is the  
17 public company and has access to capital markets and the  
18 like, has unconditionally guaranteed, unconditionally  
19 guaranteed, LendingTree Sub's debts under its credit  
20 facility that it uses for its operations.

21 LendingTree has not disputed any of these facts by  
22 affidavit or otherwise. Instead, in its reply brief and  
23 just now, LendingTree makes a legal argument. It maintains  
24 that the jurisdictional veil-piercing analysis only imputes  
25 to the parent company the subsidiary's activity in the forum

1 related to the transaction at issue. That's on pages 4 and  
2 5 of their brief. In other words, they say that this veil-  
3 piercing doctrine is limited to specific jurisdiction, not  
4 general jurisdiction. That's incorrect. A case in this  
5 district illustrates the point, but we didn't have a chance  
6 to brief it because this issue was raised in their reply  
7 brief. But in the *Bielicki versus Empire Stevedoring* case  
8 Judge Doty held that the veil-piercing analysis can impute  
9 the subsidiary's general jurisdiction to the parent.

10 There are two relevant decisions in that case, and  
11 the first one -- I'll give you the cite because, again, we  
12 didn't have an opportunity to brief it. 741 Federal  
13 Supplement 758. In that case Judge Doty pierced the veil of  
14 a subsidiary for jurisdictional purposes and held that its  
15 contacts to Minnesota were imputed to its Canadian parent  
16 company even though the cause of action arose in  
17 Pennsylvania and had nothing to do with the subsidiary's  
18 contacts in Minnesota.

19 Now, in that first decision Judge Doty did not  
20 initially address general jurisdiction; but in a second  
21 decision in that case, which is 765 Federal Supplement 991,  
22 Judge Doty amended his prior decision and apparently  
23 corrected that decision to hold that both defendants,  
24 including the Canadian parent company, were subject to the  
25 Court's general jurisdiction and he denied motion to

1 dismiss.

2 And again, the only basis for exercising any  
3 jurisdiction, including general jurisdiction, over the  
4 Canadian parent company was its domination and control with  
5 the Minnesota subsidiary. Again, this was a claim that  
6 arose in Pennsylvania.

7 So to make their argument to the contrary,  
8 defendants cite two cases from other jurisdictions. One is  
9 *Mesler* from the California Supreme Court applying California  
10 law, and the other is *Lumpkin* from the Seventh Circuit. But  
11 neither case speaks to this issue at all. Neither case has  
12 anything whatsoever to do with personal jurisdiction. Both  
13 of defendants' cases address an entirely separate question:  
14 Namely, whether a settlement and release with a defendant  
15 also operates as a release of an alleged alterego of the  
16 settling defendant. In both cases the courts found that it  
17 does not release the alterego unless the release states  
18 otherwise. Again, that has just nothing to do with  
19 jurisdiction.

20 So with that, I'll move to issue two, which is  
21 specific jurisdiction of HLC. I'll turn briefly to this one  
22 because, again, defendants don't dispute, at least for the  
23 purposes of this motion, that HLC's jurisdictional contacts  
24 are imputed to them. Those contacts would include HLC's  
25 origination of faulty mortgages in Minnesota which directly

1 contributed to its indemnification liability to Lehman.

2 But defendants argue that the allowed claim was  
3 based on HLC's sale of loans from California to a bank  
4 located on the east coast. They suggest that the fact that  
5 some of those loans may have originated in Minnesota has no  
6 bearing on Lehman's claim. But that's wrong. It's too  
7 narrow. The location of the properties in these mortgage-  
8 related disputes and the location of the borrowers was of  
9 central importance to Lehman's claims against HLC. The  
10 claims were for breaches of representations and warranties.  
11 Those reps and warranties were breached by  
12 misrepresentations about things like where the borrower  
13 worked, how much money they made, their credit worthiness,  
14 whether they planned to live in the house, and so forth.

15 The losses that were sustained by Lehman were  
16 caused by default on those mortgages. So for these  
17 Minnesota mortgages, the locus of all these facts is  
18 Minnesota. Now of course there were mortgages in other  
19 states as well. This is a multi-state controversy, but it  
20 has a substantial connection to Minnesota.

21 So we submit that HLC's origination of mortgages  
22 in Minnesota with Minnesota borrowers, Minnesota real  
23 estate, gave rise to a six-figure liability to Lehman,  
24 creates that substantial connection; and at a minimum, we  
25 submit that it satisfies the minimal prima facie standard on

1 this motion to dismiss. In our brief we cited the *Burger*  
2 *King* case from the Supreme Court which explained that even  
3 one transaction can be sufficient to give rise to specific  
4 jurisdiction if it creates a substantial connection with the  
5 forum, and we submit that these loans satisfy that standard.

6 So moving on from jurisdiction, the -- if Your  
7 Honor finds either general or specific jurisdiction, then  
8 Your Honor can hear the case. And then all that remains is  
9 whether to exercise Your Honor's discretion to transfer.  
10 And courts emphasize at the outset that a motion to transfer  
11 should not be freely granted. It should -- the movant here,  
12 which is LendingTree, bears a heavy burden to show that the  
13 factors strongly favor a transfer.

14 The parties are broadly in agreement as to what  
15 the factors are. There were a couple of differences that I  
16 will address a bit later owing to the fact that we submit  
17 that Section 1412 governs the transfer analysis because this  
18 is a related to bankruptcy case and not Section 1404,  
19 although Section 1404 is certainly persuasive so far as the  
20 overlap.

21 But I'll start with the convenience of witnesses.  
22 LendingTree has invoked this ground as a reason to transfer.  
23 They say all of our people are in North Carolina. None of  
24 them are in Minnesota.

25 But to start with, the *Bae Systems* case, which we

1 cite, emphasizes that the focus of this factor is on  
2 nonparty witnesses since it is generally assumed that  
3 witnesses within the control of the party calling them, such  
4 as employees, will appear voluntarily in a foreign forum.  
5 Defendants have said nothing at all about nonparty  
6 witnesses. And while this is not a case I cited in our  
7 brief, Your Honor made the exact same observation in the  
8 *Valspar* case.

9 So in addition, as the movant, it is defendants'  
10 burden on this convenience of the witnesses point to clearly  
11 specify the essential witnesses to be called. To name them.  
12 To make a general statement about what their testimony will  
13 cover. That permits the Court to carry out its duty to  
14 examine the materiality and importance of the anticipated  
15 witness's testimony and then determine their accessibility  
16 and convenience to the forum. Again, I'm paraphrasing from  
17 the *Bae Systems* case that we cited.

18 THE COURT REPORTER: Excuse me. Could I have the  
19 other attorney mute, please? Could you please mute?

20 THE COURT: Mr. Corcoran, could you mute, please?

21 THE COURT REPORTER: Thank you.

22 MR. SLOCUM: Okay. I hope I was coming through  
23 sufficiently clearly.

24 THE COURT REPORTER: I think we are okay.

25 MR. SLOCUM: Okay. So I was just mentioning that

1 the Court has to know who the witnesses are and know what  
2 they are going to testify about in order to assess whether  
3 these witnesses are actually all that important to the case  
4 and whether they will be able to come to Minnesota.

5 Defendants have not done that. They have not  
6 identified in their briefs, or here today, one single  
7 witness, either a party or nonparty witness, let alone one  
8 that would be inconvenienced by a Minnesota forum. They  
9 have not stated what any witness's testimony would cover so  
10 that the Court can confirm that it's material evidence and  
11 not duplicative of other evidence. This is simply, in our  
12 submission, a complete failure to present the type of  
13 evidence that it is their burden to come forward with on  
14 this motion.

15 So I'll turn now to the convenience of the  
16 parties. Now, the convenience of the parties can involve  
17 witnesses as well insofar as it involves costs. And while  
18 it's true that LendingTree is located in North Carolina,  
19 nowhere in their briefs, or in counsel's presentation just  
20 now, have they come forward with any showing that  
21 LendingTree would actually be inconvenienced by litigating  
22 in Minnesota. It's not cost prohibitive for LendingTree.  
23 It's not even material for them. They are a multi-billion  
24 dollar enterprise with operations all over the place.

25 By stark contrast, Lehman is no longer the

1 investment banking giant that it once was. All that's left  
2 of it is the plan administrator winding up the estate for  
3 the benefit of its creditors; and when that administration  
4 is complete, it will cease to exist. Now, these creditors  
5 have been waiting for 12 years to be paid on their claims so  
6 time is a little bit of the essence and efficiency is  
7 important.

8 As to the location of documents, they noted in  
9 their brief, but recent decisions including by Your Honor in  
10 this district have increasingly recognized that this factor  
11 does not have any real significance. We cited the CVS case  
12 in our brief. Your Honor made the same observation in  
13 *Valspar*. There's no reason that this factor should carry  
14 any weight.

15 This is not a case about whether a signature is  
16 authentic. The contracts that are in dispute here have been  
17 on file with the SEC for many years. There's no dispute  
18 whatsoever about their authenticity. It's just about the  
19 application and what they mean.

20 So I would submit that the convenience of the  
21 parties element is either neutral or, if anything, weighs  
22 somewhat against the transfer. While it's true that  
23 Minnesota -- Lehman doesn't have operations in Minnesota,  
24 its mortgage team is based in Denver and in Kansas, which is  
25 at least closer to Minnesota than it is to North Carolina or



1 the east coast.

2 So the final element is the interests of justice  
3 and with these, we submit, weigh strongly against a  
4 transfer, not strongly in favor of a transfer, because this  
5 prong really boils down to efficiency. Efficiency in the  
6 administration of Lehman's estate and for the Court. So one  
7 of the driving reasons why this forum makes sense is Your  
8 Honor's familiarity with the facts and legal issues in this  
9 case. Your Honor has grappled with the contracts pursuant  
10 to which LendingTree assumed HLC's liabilities.

11 For example, in their reply brief LendingTree, and  
12 of course just today as well, LendingTree argues that only  
13 having decided preliminary motions is not enough. They  
14 point out that the *Steward versus Up North Plastics* case  
15 that we cite is more advanced procedurally than this case.  
16 But they don't mention the *Alternative Pioneering Systems*  
17 case that we also cite. There, the case was no more  
18 advanced than this one; and it did not involve, as we have  
19 here, a closely-related case where the Court had dealt with  
20 important issues of fact and law that identically overlap.  
21 The *Alternative Pioneering Systems* court was ruling on  
22 preliminary motions. Those were motions to dismiss and for  
23 a preliminary injunction. Yet it denied the transfer in  
24 part based on its own familiarity with the parties' claims.

25 So transferring this case to a new court, we

1 submit, that's unfamiliar with the contracts and the facts  
2 of this case, will undoubtedly give rise to a steep learning  
3 curve for the new court, further delay with another round of  
4 preliminary motion practice; and that would, in turn, delay  
5 the wind up of Lehman's estate and prejudice its creditors.

6 So with that, we submit that the motion to  
7 transfer should be denied. This is a convenient forum.  
8 It's certainly as convenient or more convenient than North  
9 Carolina in every way that really counts for the courts.

10 Now, I want to address just at the end the  
11 question of if Your Honor decides to transfer the case, and  
12 again, we submit that you should not do so, but in that  
13 event, as between North Carolina and New York, New York  
14 would be a more convenient forum.

15 So there's been no dispute here that Your Honor  
16 has the power to transfer the case to New York, and the  
17 Bankruptcy Court there would have jurisdiction over both  
18 defendants. We pointed that out in our brief and they have  
19 not disputed it in their reply brief or today. So it would  
20 be a proper forum in terms of jurisdiction of venue.

21 And Section 1412 carries a "strong presumption" in  
22 favor of where the bankruptcy is located. That's New York.  
23 Now, that presumption is offset by the choice of the  
24 plaintiff's forum here, which is Minnesota; but if Your  
25 Honor does determine to transfer, we think that that factor

1 should carry some weight.

2 The bankruptcy judge in -- excuse me, the  
3 bankruptcy judge in New York, Judge Chapman, has some  
4 familiarity with this case because it was her that presided  
5 over Lehman's original indemnification action against HLC,  
6 and she is also overseeing the administration of Lehman's  
7 estate generally.

8 LendingTree says, Well, Lehman should not get a  
9 second bite at the apple regarding the choice of forum.  
10 According to them, Lehman filed suit in Minnesota. It took  
11 its shot, so for that reason alone the Court should ignore  
12 New York as a potential forum and pick between Minnesota and  
13 North Carolina. And we submit that that's incorrect and  
14 that it's not true that just because Lehman is not based in  
15 Minnesota that its choice is entitled to no deference. Even  
16 the cases that they cite say it's entitled to less  
17 deference, but less deference is not no deference.

18 And -- but they have this one-and-done theory in  
19 which they raised in their reply brief -- and we'd note that  
20 the *Groesbeck versus Sgarlato Med* case -- I'll spell that  
21 name. S-G-A-R-L-A-T-O, and the cite is 2011 WL 383701.  
22 There, it was a case like this where the plaintiff had  
23 originally filed suit in Minnesota but was from Utah; and in  
24 the course of that motion, having lost his original choice  
25 of forum, said, Well, okay, we'll just transfer it to Utah

1 where I live.

2 And the Court said Groesbeck's initial choice of  
3 Minnesota is entitled to little deference because he is not  
4 a resident of this state nor did the underlying events occur  
5 here. However, Groesbeck now advocates transfer to the  
6 District of Utah as a resident of that forum. As such, as  
7 between the District of Utah and the Northern District of  
8 the California, which is where the defendants wanted to send  
9 the case, the Court will defer to Groesbeck's choice. This  
10 action is transferred to the District of Utah.

11 So in the event Your Honor were to disagree with  
12 me that this forum is proper -- and again, we submit that it  
13 is proper -- then Lehman is at home in New York and New York  
14 would be an appropriate forum and so the case should be  
15 transferred there. With that --

16 THE COURT: Just to be clear, Mr. Slocum, that  
17 case you just cited, that's a Minnesota District Court case,  
18 am I correct, from 2011?

19 MR. SLOCUM: That is correct, Your Honor, yes.

20 THE COURT: Okay. Very good.

21 All right. Then we'll turn it over to  
22 Mr. Corcoran, please.

23 MR. CORCORAN: Thank you, Your Honor. And sorry  
24 for not muting my line before and creating some background  
25 noise.

1 Um, I just want to respond to a few of the points  
2 that Mr. Slocum raised. I'll start with the last one he  
3 raised. That case is from 2011. The *RFC* case that Judge  
4 Ericksen decided relied on a Supreme Court case called  
5 *Atlantic Marine* contract [sic] that was decided in 2013.  
6 That case resolved a split among the courts as to what to do  
7 with a case that was filed in an improper forum based upon a  
8 forum selection clause. Various courts have said you could  
9 dismiss it for lack of subject matter jurisdiction. You  
10 could dismiss it under 1391 as an improper forum.

11 And the Supreme Court there resolved that dispute  
12 and said 1391 defines what is a proper forum, and a case  
13 that is filed in violation of a forum selection clause in a  
14 proper forum under 1391 is ultimately properly forumed in  
15 that venue. And what to do is is to transfer the case to  
16 where the forum selection clause sits.

17 The Supreme Court said as a result of the first  
18 choice that the plaintiff -- or the parties to the contract  
19 had exercised their venue privilege, and that all of the  
20 factors other than the public interest factor are  
21 conclusively in favor of transfer to the selected forum.

22 So that decision was interpreted by Judge Ericksen  
23 to say, after the 2011 decision that was referenced by  
24 Mr. Slocum, that the Supreme Court had found that plaintiffs  
25 only get one choice; and once they have exercised their

1 venue privilege, thereafter they are not entitled to a  
2 second decision.

3 So we would -- it is our position that that  
4 decision has been abrogated by the Supreme Court's decision  
5 in *Atlantic Marine*; and Judge Ericksen, in looking at the  
6 same issue afterwards, ruled that the plaintiff's second  
7 choice of forum is not entitled to any deference at this  
8 juncture.

9 Mr. Slocum also said that the defendants did not  
10 identify which witnesses would need to testify and what they  
11 would need to testify about to demonstrate an inconvenience.  
12 Your Honor, that is apparent on the face of the complaint  
13 itself. It is apparent in the filing that they included in  
14 their opposition, which is the employment contracts that  
15 they are relying on. It is -- Mr. Lebda, the CEO of  
16 LendingTree, LLC, will be a focal point of discovery. They  
17 want to have him testify about their theories as to whether  
18 or not he had control over the entities. They attached  
19 other employment contracts of individuals in Charlotte that  
20 they contend that they will rely on to establish that there  
21 is a domination and control sufficient to pierce the  
22 corporate veil.

23 So while it's true we did not include what  
24 testimony we would expect from them, it's apparent on the  
25 face of their complaint that they intend to rely on that

1 testimony to establish that LendingTree, Inc. and  
2 LendingTree, LLC are liable for the obligations of HLC under  
3 the allowed claim.

4 I also want to address the specific jurisdiction  
5 point about HLC. There's two points there, Your Honor.  
6 First, just as a general matter, you can't bootstrap  
7 specific jurisdiction. So whether or not this Court would  
8 have specific jurisdiction over a dispute between HLC and  
9 Lehman's banking affiliate with respect to those \$400,000  
10 loans, it would not give this Court specific jurisdiction  
11 over all of the other related claims. There is no such  
12 thing as related to specific jurisdiction. There is either  
13 general jurisdiction or specific jurisdiction.

14 And so to the extent there was jurisdiction over  
15 that narrow set of loans that were originated, that does not  
16 provide the Court with specific jurisdiction broader than  
17 that. More importantly, they don't seek to litigate those  
18 claims in their lawsuit. It is the plaintiff's position  
19 that the allowance of the proof of claim by the Northern  
20 District of California Bankruptcy Court conclusively  
21 establishes HLC's liability. And although they are seeking  
22 as a declaration that LendingTree has an obligation to make  
23 up the difference between what they received on account of  
24 their claim in HLC's bankruptcy and the amount of the  
25 allowed claim, there is no argument that they want to

1 litigate the underlying claims here.

2 So that's not really material to the dispute, Your  
3 Honor. And so we don't think that it's a basis to establish  
4 a convenient forum here since those issues are not part of  
5 their complaint as alleged. And so we do not think that  
6 that is a proper way to establish a convenient forum.

7 Finally, I just want to address a couple of points  
8 to make the record clear. Mr. Slocum was saying certain  
9 things that Your Honor decided, certain positions that the  
10 defendants have taken in this lawsuit and the other lawsuit.  
11 We do not agree that you've decided any of the issues  
12 definitively. You have decided for purposes of a motion to  
13 dismiss that ResCap adequately alleged facts that would  
14 allow them to press their claim before this Court to try to  
15 prove, if they came forth with evidence, that they could  
16 pierce the veil.

17 This Court has not heard any of that evidence.  
18 This Court has not made any evidentiary findings. Like the  
19 case that Mr. Slocum cited, there wasn't a preliminary  
20 injunction where there was evidence heard and issues  
21 decided. All you have decided is whether or not the  
22 complaint is sufficient on its face to allege claims.

23 We do not concede that HLC's contacts were  
24 sufficient to be -- or I'm sorry -- that LendingTree, Inc.  
25 or LendingTree, LLC's activities were sufficient to impute



1 the contacts of HLC. We assumed it for purposes of this  
2 argument because we do not believe that HLC's contacts,  
3 whether or not they are imputed, are sufficient for this  
4 Court to exercise specific or general jurisdiction over the  
5 claims asserted in the lawsuit.

6 If Your Honor doesn't have any other questions, we  
7 would ask Your Honor to grant the motion, dismiss  
8 LendingTree, Inc., and transfer the case to the Western  
9 District of North Carolina.

10 MR. SLOCUM: Your Honor, may I be heard for, you  
11 know, 30 to 45 seconds on those issues?

12 THE COURT: Of course, yes.

13 MR. SLOCUM: Thank you. I will just address two  
14 of them. Taking them in order, there was talk about whether  
15 the *Atlantic Marine* case overruled *Groesbeck*. We disagree.  
16 This is not a case in our submission where venue was  
17 improper. This is not a case where there was a forum  
18 selection clause. This analysis, this discretionary  
19 transfer analysis, I think weighs -- is guided by Your  
20 Honor's discretion. And so the amount of weight to give a  
21 particular factor can be guided by past cases but should be  
22 guided in the exercise of discretion on the specific facts  
23 of the case. And so we don't think that that is  
24 controlling.

25 And second, on the specific jurisdiction question,

1 Mr. Corcoran said that it relates only to a narrow set of  
2 loans and Your Honor could only exercise jurisdiction over  
3 some loans and not others, but that's not right. Multi-  
4 state controversies have to be heard somewhere and they  
5 can't be split up among the various states where those  
6 connections occur.

7 The Supreme Court has said that you need a  
8 substantial connection to the forum. So long as the case  
9 has a substantial connection to the forum, based on whatever  
10 part of the case has those contacts, that is sufficient for  
11 the Court to hear the whole case.

12 That is all, Your Honor. I have nothing more.

13 THE COURT: Okay. This has been very nicely  
14 briefed and argued and the Court will study it carefully and  
15 take it under advisement. Court is adjourned.

16 MR. SLOCUM: Thank you, Your Honor.

17 OR. CORCORAN: Thank you, Your Honor.

18 (Court adjourned at 10:16 a.m.)

19 \* \* \*

20  
21 I, Carla R. Bebault, certify that the foregoing is  
22 a correct transcript from the record of proceedings in the  
23 above-entitled matter.

24 Certified by: s/Carla R. Bebault  
25 Carla Bebault, RMR, CRR, FCRR